

FINAL STATEMENT OF REASONS

Comments were received regarding two areas of proposed rulemaking described in the Notice of Rulemaking and Initial Statement of Reasons.

Applicability of PERB Representation Regulations to MMBA Parties

When PERB first adopted regulations, in 2001, describing representation procedures under the Meyers-Milias-Brown Act (MMBA),¹ the statute was silent as to whether such regulations were permissible. Section 61000, as initially adopted, provided that PERB regulations concerning MMBA representation procedures were applicable only if adopted by a local agency as its own rules or where, in a particular case, all parties agreed to be bound by them. PERB is not aware of any agency that has adopted PERB's rules, and in only a very few instances have parties elected to be bound by PERB rules. The MMBA was later amended (Chapter 215, Statutes of 2003) to expressly provide PERB with the authority to adopt representation rules where a local agency does not have rules. Section 61000 was amended to conform to the statutory change. However, the language regarding the applicability of PERB rules where the employer adopted them or the parties agree to use them was not deleted. The language about voluntary submission to PERB rules is now unnecessary, given the statutory change. Thus, the proposed regulatory changes include an amendment to section 61000 to limit the applicability of the representation regulations to the circumstance expressed in the MMBA. This approach is consistent with the rules adopted in 2004 under the Trial Court Act (section 81000) and Court Interpreter Act (section 91000), based on statutory provisions regarding PERB's authority that are identical to that found in the MMBA.

Comments received from counsel for the Service Employees International Union (SEIU) opposed the proposed deletions from section 61000. SEIU contends the changes would remove from PERB authority that PERB has and that the Legislature has sanctioned. SEIU argues that the legislative clarification provided in the 2003 enactment was intended to confirm that PERB could adopt regulations in the absence of local rules, and did not reflect any intent to negate PERB's then-existing rules. Instead, according to SEIU, the legislative revisions to the statute in 2003 had the effect of ratifying the provisions PERB now proposes to delete. SEIU also argues that harm would result in retaining the existing language, while deletion might "invite" the Legislature to amend the statute one more time.

The Board approved the proposed deletion of language in Section 61000 based on the following considerations. First, the language "authorizing" a public agency to adopt PERB's rules as its own is unnecessary and duplicative of statutory provisions. The MMBA, at Government Code section 3507(a), grants authority to a public agency to adopt reasonable rules and regulations for the administration of employer-employee relations. Thus, it is unnecessary for PERB to have a rule that purports to "authorize" the public agency to adopt certain rules. Further, if a public agency's intent is to have PERB's regulations govern the public agency's employer-employee relations, it need not adopt any rules itself. Under current law, PERB's regulations fill the gap and are applicable to that public agency.

¹ The MMBA is codified at Government Code section 3500 et seq.

Second, the language in Section 61000 that allows for parties, even in the presence of existing local rules, to be bound by PERB's regulations in particular case, creates the possibility that PERB could agree to run an election or resolve a representation dispute pursuant to such an agreement, only to have an employee or other interested party file an unfair practice charge alleging that the public agency is acting in violation of its own local rules. In such a situation, PERB might have to issue an unfair practice complaint against conduct in which it is itself an active participant.

Unit Modification Petition issues

Three areas of change were proposed regarding unit modification procedures. First, Section 32781 is amended to eliminate the requirement that parties use a PERB form for such filings. Instead, the regulations describe what information must be provided to PERB in order to pursue a unit modification. (Sections 61450, 81450, and 91450 are already written in this manner.)

Second, the Board proposed to eliminate ambiguity and add clarity regarding when majority proof of support is required for a petition that seeks to add unrepresented positions to a unit. Section 32781(e), and comparable provisions in sections 32781, 61450, 81450, and 91450, state that PERB "may require" such support, but the regulations do not provide criteria for when PERB "should" require support. Use of a standard whereby support was required if the positions to be added equal 10 percent or more of the number of employees in the established unit was approved in a Board decision (State of California, Department of Personnel Administration (1989) PERB Decision No. 776-S) but never expressly adopted as "the standard" by the Board. The proposed amendments to sections 32781, 61450, 81450, and 91450 would incorporate the 10 percent threshold standard and make it mandatory.

Third, the Board is also proposing to provide for a circumstance where 30 percent employee support would be required for a unit modification petition. The fact pattern where this proposed change would be applicable involves a union petitioning to create and become the exclusive representative for a unit of currently unrepresented employees, and an exclusive representative of a separate unit that wishes, instead, to have the employees added to its unit. In any particular case, either the unit modification petition or the initial representation petition might be filed first, but in any event the two filings are being processed at the same time. Under these circumstances, it would be appropriate to have the exclusive representative demonstrate support for its unit modification petition among the unrepresented employees when the petitioning union has already demonstrated support (normally a majority). The 30 percent level is provided for as it is the most common level of support required for an employee organization to intervene on a request for recognition or qualify for the ballot in a representation election. This proposed change also affects sections 32781, 61450, 81450, and 91450.

The United Automobile, Aerospace and Agricultural Workers of America (UAW), in both written and oral comments, while not disagreeing with any of the changes under consideration, asked that the Board go one step further with respect to petitions filed under the last

circumstance involving overlapping unit modification and initial representation petitions. The UAW urged that unit modification petitions be dismissed if filed after the posting/intervention period associated with an overlapping petition for representation. The UAW relied in part on the Board's decision in Arcadia Unified School District (1979) PERB Decision No. 93. The UAW, at the public hearing, cited instances where a petition filed by the UAW under the Higher Education Employer-Employee Relations Act (HEERA),² was affected by unit modification petitions filed after the time period for filing a valid intervention had lapsed.

The Board adopted the above-described regulation changes as proposed and declined to amend the additional requirements suggested by the UAW into Section 32781. The Board considered the fact that certain initial representation petitions, including petitions for certification under HEERA, do not require a posting by the employer and do not have an intervention period. The Board also considered the fact that adopting the proposed language without the additions requested by UAW would allow determinations to be made on a case-by-case basis as to the timeliness of any unit modification petition, and would allow for application of the new 30 percent employee support requirement for a unit modification petition even where it was filed in advance of a later-filed, overlapping initial representation petition.

² HEERA is codified at Government Code section 3560 et seq.